IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 412 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GALUBHAI D RATHWA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 412 of 1991

MR ANIL S DAVE for Petitioner No. 1

..... for Petitioner No. 2

MR KT DAVE, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 30/01/2003

ORAL JUDGEMENT

1. The Appellants - accused were charged for committing murder of Chheliya Kagda, aged about 50 years and his wife Rangliben, aged about 48 years, punishable under Section 302 read with Section 114 I.P.Code. The

accused No.2 was also charged for the offence u/s.323 I.P.Code for causing injury to the complainant Chandra, son of deceased Chheliya, which is punishable u/s.323 I.P.Code. Both the accused were tried by the learned Addl. Sessions Judge, Panch Mahals at Godhra in Sessions Case No.80 of 1990 for the aforesaid offences u/s.302, 323, 114 I.P.Code. After appreciating the oral as well as documentary evidence led before the learned trial Judge, the learned trial Judge held that the prosecution has proved its case against the accused, but convicted both the accused for the lesser offence u/s. 325 read with 114 I.P.Code instead of major offence u/s.302 I.P.Code. Having heard the accused on the point of sentence the learned trial Judge imposed the sentence of 2 years R.I. to the appellant - accused Galubhai Dhediyabhai Rathva and to pay fine of Rs.500/- i/d to further under-go 3 months imprisonment. The Appellant - accused No.2 Nanji Galubhai Rathva was sentenced to suffer 5 years R.I. for the offence u/s. 325 as well as Section 325 r/w 114 I.P.Code and to pay fine of Rs.1000/- i/d to further under-go 6 months imprisonment. This impugned order of conviction and sentence dated 14.6.1991 passed by the learned Addl. Sessions Judge in Sessions Case No.80 of 1990 is challenged in this Appeal by the Appellants - accused.

2. At the out-set I may state that though 2 persons lost their lives in the incident for which both the accused were charged for the major offence u/s.302 I.P.Code the State of Gujarat has not thought it fit to file Appeal against the order of sentence passed by the learned Addl. Sessions Judge acquitting the Appellant accused for the major offence u/s.302 I.P.Code. The State Government has not filed any Appeal u/s.377 Cr.P.C. for enhancing the sentence. In that view of the matter I have to deal with the conviction Appeal of the appellants - accused.

3. The incident in question took place on 8.2.1990 at Limda Dhara village. It was a festival of Eid. The accused as well as the deceased persons and the complainant were Adivasi. They were celebrating the festival. After having full drunk they were dancing and at that time accidently the leg of Chandra, son of deceased Chheliya and Rangli touched the leg of accused No.1 Galiya. Thereupon the accused No.1 Galiya got excited and gave stick blow on the head of Chandra, whose parents were sitting nearby. When they had gone to tell accused Galiya at that time accused No.2 Nanji, son of accused No.1 Galiya, gave stick blow to Chheliya. Thereupon Rangli, wife of Chheliya, tried to intervened.

Therefore, both the accused caused injuries to Rangli and because of that both, Chheliya and his wife Rangli, fell down. Chandra went to home and informed about the incident to his uncle Bachu Rupla and his brother Muliya and Karsan. They came back at the place of the incident and took both, Chheliya and his wife Rangli to Gogamba Hospital. However, Chheliya died on the way when they were carried to the Hospital. Thereupon Chandra lodged complaint before the Police about the incident. Rangli was admitted in Godhra Civil Hospital for further treatment from Gogamba Hospital, but she had also died due to her head injury.

4. As per the evidence of Dr.Soni, P.W.1, Ex.23, deceased Chheliya died due to injury received by him on his head which was 3" x 1". The said injury proved to be fatal. Skull bone had fracture having 2" x 1" injury. Blood was clotted there. Because of these injuries brain was damaged and therefore due to heart failure deceased Chheliya died.

5. As per the evidence of Dr.Sarvarvali, Ex.31, Rangli died on the next day at Godhra Hospital. She had injuries on her left ear as well as on the Jaw. She had injury near both her eyes. Due to injury her scalp was fracture. Due to the injury received by her on her head she had profused bleeding and because of shock and haemorrhage she died. According to the doctor the injuries were possible with stick which was recovered from the accused.

6. There was only one eye witness Chandra, Ex.28. He clearly stated that they were celebrating festival in which he was taking part and dancing. His parents Chheliya and Rangli were sitting at a short distance. Accidently his leg touched the accused Galiya Dheda. Thereupon accused Galiya gave him stick blow on his forehead. He, therefore, ran towards his parents who were sitting nearby. When his father Chheliya told Nanji son of Galiya, thereupon both the accused Galiya and his son Nanji gave stick blow to his father. They were identified by him in the Court. He had further stated that when his mother Rangli tried to intervene she was also beaten by both the accused with stick. They fell down, therefore, he informed about the incident to his brother and other village people. Nothing substantially has come out in his cross examination. An attempt was made by the defence to show that he was not an eye witness, but he was not shaken in the cross examination. Minor discrepancies are bound to be there in the evidence of Chandra because he was a rustic Adivasi. It is true

that other witnesses Ravji Dhana and others turned hostile, but the conviction can still be based on the solitary evidence of an eye witness provided that his evidence is not shaken in the cross examination and found to be trustworthy by the Court.

7. Suggestion was made to the doctor that due to fall both the deceased might have received injuries. Looking to the nature of the injury it is not possible to accept the defence version that both the deceased received injuries on the head due to fall.

8. Thus, when the evidence of Eye witness Chandra is duly corroborated by the medical evidence of two doctors then it cannot be said that the learned trial Judge has erred in holding that the prosecution proved its case against the accused beyond reasonable doubt.

9. From the Judgment of the learned trial Judge it appears that though both the accused were charge-sheeted for the major offence u/s.302 of I.P.Code for committing murders of Chheliya and his wife Rangli, however, the learned Public prosecutor submitted before the Court that the accused can be convicted either for an offence u/s.304, Part-I or 304, Part - II I.P.Code. The learned Judge, without assigning any reasons, held that the offence, if any found to be proved against both the accused, is u/s.325 I.P.Code and neither u/s.302 or 304 Part-I nor 304 Part-II I.P.Code and accordingly the learned Judge convicted both the accused for the offence u/s.325 and 325 r/w 114 I.P.Code and sentenced them as stated above.

10. From the evidence of the doctor I fail to understand that how the learned Public Prosecutor had argued before the learned trial Judge that it was a case u/s.304 Part-I or 304 Part-II I.P.Code. For taking the case of the accused one must prove that his case falls under any of the exception of Section 300 I.P.Code which is not the case at all. It is unfortunate that without any basis and without considering the provisions of law straightway argument was advanced before the learned trial Judge by the Public Prosecutor that the case falls under Section 304, Part-I or 304, Part-II I.P.Code. Worst part of it that without recording any reasons the learned trial Judge has also straightway come to the conclusion that the prosecution has proved its case against the accused for the offence u/s.325 I.P.Code and accordingly he sentenced the accused for the offence u/s.325 I.P.Code which is most unfortunate.

11. As stated earlier the State of Gujarat has not even thought it fit to challenge such an order of acquittal passed by the learned Judge acquitting the accused for major offence u/s.302 I.P.Code. If there was an acquittal Appeal then perhaps this Court would have reversed the order of acquittal acquitting the accused for major offence u/s.302 I.P.Code. However, in absence of any Appeal against the order of acquittal this Court will not disturb such order of acquittal of the accused for the major offence u/s.302 I.P.Code. Maximum punishment for the offence u/s.325 I.P.Code is 7 years and still the learned Judge has imposed sentence of only 2 years R.I. against the appellant accused No.1 and 5 years R.I. to Appellant - accused No.2. Looking to the nature of the offence committed by the accused the sentence is too less and it should have been maximum. Though there is no Appeal for enhancement of sentence this Court could have exercised its suo-motu powers and enhanced the sentence but the fact that the incident in question took place way back on 8.2.1990 and today we are in end of January, 2003 i.e. almost period of 13 years have passed by now and therefore I do not see any reason to interfere with the order of sentence also.

12. In view of the above discussion this Appeal fails and is hereby dismissed. Bail Bonds of both the accused shall stand cancelled. However 4 weeks time is granted to the appellants - accused to surrender their bail.

sd/-

Date : January 30, 2003 (B.J.Shethna, J.)

sas